IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 24970 of 2006
With
CIVIL APPLICATION No. 1084 of 2007
In SPECIAL CIVIL APPLICATION No. 24970 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? No

2 To be referred to the Reporter or not ? No

3 Whether their Lordships wish to see the fair copy of the judgment ? No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? No

5 Whether it is to be circulated to the civil judge ? No

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JAYANTBHAI KANTILAL GAGLANI - Petitioner(s)
Versus
JYOTSNABEN JAYANTBHAI GAGLANI - Respondent(s)

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Appearance :
MR RC KAKKAD for Petitioner(s) : 1,
MS MEGHA CHITALIYA for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 01/02/2007

ORAL JUDGMENT

1. Jayantibhai Kantilal Gaglani, petitioner-original opponent, has filed this petition under Article 227 of the Constitution of India, with a prayer that this Court may be pleased to issue a writ of certiorari or any other appropriate writ, order or direction, quashing and setting aside the impugned judgment and order dated 30.9.2006 passed by the learned 8th Additional Senior Civil Judge, Junagadh in Regular Execution Petition No.61 of 2006 by virtue of it allow the application Exh.15 as prayed for in Regular Execution Petition No.61 of 2006. The petition was filed on 24.11.2006.

2. When the matter was placed for hearing before this Court, this Court passed an order on 4.12.2006 and issued notice returnable on 18.12.2006.

3. Pursuant to the notice, Smt.Jyotsnaben Jayantbhai Gaglani has also appeared through advocate Ms.Megha Chitaliya who has appeared at the request of the Court.

4. The facts giving rise to this petition are as under:-

4.1 The petitioner-original opponent before this Court is a practising advocate at Junagadh. The marriage between the present petitioner and the respondent was solemnised on 24.5.1986 at Rajkot as per provisions of Hindu Law. After the marriage both petitioner and respondent were residing together at Mendarda in joint family. Out of this wedlock a baby girl was born on 29.9.1987.

4.2 After sometime a difference and dispute arose between the parties. The petitioner thereafter preferred Hindu Marriage Petition under Section 13 of the Hindu Marriage Act for divorce.

4.3 During the pendency of the said petition vide Exh.6 Civil Misc.Application No.24 of 1999 was preferred by respondent for obtaining interim maintenance. Simultaneously under Secs.18 and 20 of the Hindu Adoption and Maintenance Act, interim alimony was sought in Hindu Marriage Petition No.14

of 1999 as the reliefs which were prayed for in both the application are same in nature, common order was passed on 9.8.1999 below application Exh.5 in Hindu Marriage Petition No.14 of 1999. The learned Judge by his impugned order has awarded Rs.5,000/- as maintenance to wife and Rs.2,000/- to the girl.

4.4 It is the case of the respondent wife that pursuant to the order dated 9.8.1999 passed by the court below, the husband did not deposit the maintenance amount in this behalf and therefore respondent and minor Neha preferred a Regular Execution Petition No.61 of 2006 for recovery of maintenance arrears amount from 22.2.1999 for an amount of Rs.2,10,580.80 ps. and Rs.2,500/- for cost of Execution Petition, the total of which comes to Rs.2,13,880.80 ps. The said application was filed on 12.6.2006.

4.5 Thereafter the petitioner preferred an application Exh.9 to decide first preliminary objection qua the maintainability of the Execution Petition on the ground that the main petition i.e. Hindu Marriage Petition No.14 of 1999 has been

withdrawn and therefore interim order which was passed in the said petition has become infructuous and therefore the execution petition is not tenable.

4.6 In the said application, the wife filed reply and after hearing both the parties, the learned 8th Addl.Senior Civil Judge, Junagadh by judgment and order dated 11.8.2006 dismissed the said application Exh.9 and thereby declared that Regular Execution Petition No.61 of 2006 is tenable in the eye of law.

4.7 Thereafter the petitioner preferred an application Exh.15 contending that the execution petition is not maintainable, the respondent is not entitled to maintenance amount for the period for which the respondent and present petitioner resided together and therefore the petitioner prayed that the evidence is to be led and thereby it is to be decided that execution petition is maintainable or not. After hearing the parties, the learned 8th Additional Senior Civil Judge, Junagadh by his judgment and order dated 30.9.2006 dismissed the application Exh.15 and held that Regular Execution Petition No.61

of 2006 is tenable in the eye of law.

4.8 Being aggrieved and dissatisfied with the said orders, the petitioner husband has filed the present petition before this Court on 24.11.2006 and ultimately this Court passed the order on 4.12.2006 as well as on 21.12.2006. Thereafter during the course of hearing, the wife has also come personally and the Court asked her as to whether is there any possibility of settlement but the wife has stated that it is not possible to settle the matter. Thereafter the matter reached hearing before this Court.

5. Mr.R.C.Kakkad, learned advocate for the petitioner has set out following facts.

5.1 He has stated that in Hindu Marriage Petition No.14 of 1999 the wife has also filed application for interim maintenance under Section 24 of the Hindu Marriage Act. In the said application the wife has also claimed maintenance of Rs.15,000/- per month for herself and her minor daughter and further

Rs.14,000/- as cost as stated in the application dated 22.3.1999. In the said application the learned 5th Joint Civil Judge (S.D.), Junagadh by judgment and order dated 9.8.1999 – order below Exh.5 in HMP Suit No.14/99 has held that the wife is entitled to Rs.5,000/- as maintenance to wife and Rs.2,000/- as maintenance to minor daughter i.e. Rs.7,000/- per month from 22.2.1999. This may be taken on record.

5.2 Being aggrieved and dissatisfied with the said judgment and order, the husband filed Civil Revision Application No.1349 of 1999 before this Court and this Court (Coram: Kundan Singh, J.) by order dated 8.9.1999 pleased to pass the following order:

> "Issue notice returnable within three weeks. The operation of the order dated 9.8.1999, passed by the 5th Joint Civil Judge (S.D.), Junagadh below Exh.5 in HMP No.14/99 shall remain stayed till then, subject to the condition that the petitioner shall regularly deposit in the lower court, on amount of Rs.3,000/- per month towards

interim alimony of the respondents. On deposit of the said amount, the respondent will be at liberty to withdraw the same. Direct service is permitted."

5.3 It appears that the said order was ex-parte order without hearing the wife.

5.4 It appears that in the said application the wife was not heard and ultimately the petitioner thereafter decided to withdraw the Civil Revision Application and this Court (Coram: K.A.Puj, J.) by the order dated 16.9.2002 in which it was stated that the matter is settled between the parties and both husband and wife, who are petitioner and opponent herein are residing together. In this view of the matter, the present revision application stands disposed of as having become infructuous and interim relief stands vacated. The said order is also taken on record.

5.5 Meanwhile both husband and wife decided to stay together. Thereafter the husband has filed

application on 19.7.2001 before the trial court. In that matter the husband has filed application and prayed that as both husband and wife decided to stay together the application HMP Suit No.14/99 which was filed by the husband, the husband has decided to withdraw the said application on the ground that both the parties have decided to settle the matter out of Court. According to the learned advocate for the petitioner, the application was filed by learned advocate for the husband and which was given to the learned advocate for the wife. However, it appears that the said application was served to S.B.Shukla, learned advocate in this behalf. However, Ms.Megha Chitaliya, learned advocate who appears on behalf of wife, after obtaining instructions from her client, states that the application was served on S.B.Shukla, learned advocate in this behalf whereas advocate for the wife before the trial court is one Mr.Sureshchandra D.Dave and Ms.Hemaben A.Shukla and therefore this application was not served on the advocate for the wife and therefore the order of the Court granting withdrawal is passed by the trial court neither hearing the wife nor the advocate of

the wife in this behalf.

5.6 Learned advocate for the petitioner stated that the wife has filed application under Order 38 Rule 5 read with Sec.94(1)(b) of the CPC with a prayer that as husband failed and neglected to make the payment of maintenance, the Court may attach the property situated in Junagadh known as “Shreeji Tower” 2nd Floor building as well as other two offices, a Maruti Car bearing No.GJ-11-E-5868 and a motor cycle bearing No.GJ-11-A-3636. The said application was filed on 12.6.2006.

5.7 In the said application, the wife has contended that as indicated above the Court has passed the order on 9.8.1999 granting maintenance from 22.2.1999 of Rs.7,000/- per month namely Rs.5,000/- p.m. for wife and Rs.2,000/- p.m. for minor daughter.

6. As indicated above, there was subsequent proceedings before the High Court for which I have already indicated in this behalf.

7. Thereafter it was stated that in August 2001, both husband and wife settled the matter out of Court and they decided to stay together from October 2001 to April 2006. However, it appears that and in view of this staying together, the wife did not insist for amount of maintenance.

7.1 However after that when husband failed and neglected to make the payment of maintenance, the wife filed a complaint before the learned Chief Judicial Magistrate Court under Sec.156(3) being complaint No.199/2006 claiming maintenance. In the said application, the wife has indicated certain accounts which were held by the husband and the property situated therein. In the said application, the wife filed application dated 20.7.1996 and indicated in the application that in view of the settlement between the parties the application filed by the wife no longer survives.

8. In the said application, the learned trial Judge i.e. learned 8th Addl. Senior Civil Judge, Junagadh after hearing the parties passed an order on

11.8.2006 – order below Exh.9 in Regular Execution Petition No.61 of 2006. In the said application the learned trial Judge has held that it is no doubt true that the husband has withdrawn the application for maintenance but from the record it appears that the statement made in the order that only her advocate made an endorsement to be seen. However the learned advocate for the wife stated that this observation of the learned trial Judge is also incorrect because the advocate for wife is Ms.Hemaben Shukla whereas signature of Mr.S.B.Shukla is there and he is not the advocate for wife and therefore the observation of the learned trial Judge that the advocate has made endorsement i.e. 'seen' is also not factually correct and in view of the same she may make demand for the arrears. It was further stated that after the order of this Court, the husband has not paid any interim alimony and as per the wife who is residing separate from the husband, she was unable to bear her personal expenses and costs of the litigation and therefore wife is entitled to recover the amount of interim alimony by way of filing execution petition.

9. In support of the argument, the trial court relied upon the judgment of this Court in the case reported in **1992(2) GLH 414 in the matter of Pratapbhai V.Trivedi Vs. Priyavadu @ Ghanu Pratapbhai Trivedi.** In view of the said judgment, the learned trial Judge has held that said judgment supports the contention of wife, execution petition filed by the wife to recover the amount of interim alimony which was granted in the main HMP No.14/99. The said application was granted on dated 9.8.1999 and main HMP No.14/99 was withdrawn on 19.7.2001. In these circumstances, the application filed by the wife for maintenance is maintainable at law and the objection raised by husband at Exh.9 that in view of the withdrawal of the application, the said application has been rejected.

10. Being aggrieved and dissatisfied with the said order, the present petition has been filed before this Court for which I have already made necessary narration in my earlier part of the order so I do not repeat the same.

11. On behalf of respondent-wife Ms.Megha Chitalia, learned advocate appears and with consent of parties the matter has been taken up for final disposal as the matter is matrimonial matter and therefore with the consent of parties, I issue **RULE.** Ms.Megha Chitaliya, learned advocate waives service of Rule on behalf of respondent.

12. Mr.R.C.Kakkad, learned advocate for the petitioner stated that in this case admittedly wife has filed application on 12.6.2006 for arrears of maintenance from October 1999 to April 2006. The learned advocate submitted that in this case the trial court has passed the order on 22.2.1999 for maintenance so wife is entitled for maintenance from February 1999 to October 1999 because from that period the husband and wife has not stayed together and thereafter the wife separated from April 2006 and present application has been filed somewhere in June 2006 therefore three years prior to that means maintenance before June 2003 the wife is not entitled for maintenance. In support of the same the learned advocate for the petitioner has relied upon Article

105 of the Limitation Act which provides as under:

Description of suit	Period of Limitation	Time from which period begins to run
105. By a Hindu for arrears of maintenance	**Three Years**	**When the arrears are payable.**

12.1 He stated that the said article provides that a Hindu wife can claim arrears of maintenance of three years when the arrears are payable. According to the learned advocate for the petitioner, when the learned trial Judge passed the order of maintenance i.e. in February 1999, the order of maintenance was payable whereas present application has been filed somewhere in June 2006 and therefore claim of maintenance by wife is time barred in view of Article 105 of the Limitation Act.

13. On the other hand, Ms.Megha Chitaliya, learned advocate for the wife stated that entire argument of learned advocate for the petitioner is misconceived in eye of law. According to her, the real provision of law is Article 136 of the

Limitation Act which provides as under:

Description of suit	Period of Limitation	Time from which period begins to run
136. For the execution of any decree (other than a decree granting a mandatory injunction or order of any civil court.	**12 Years**	**When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place:** **Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.**

13.1 The learned advocate has stated that in this case the trial court has already passed the order and the present application has been filed for execution and therefore real Article is 136 and the said

article provides for the execution of any decree other than a decree granting a mandatory injunction or **order of any civil court.** The period of limitation is 12 years and when the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place. In view of this specific provision, the learned advocate submits that the present application filed by the wife is clearly maintainable in the eye of law and it is not barred by limitation.

14. First of all I decide the point regarding limitation in this behalf. I have considered the facts and circumstances of the case. In this case the order for pendente lite maintenance and expenses of proceeding passed on 9.8.1999 and the execution application for enforcement of order filed on 12.6.2006.

14A. As per Article 105 of the Limitation Act, a

Hindu wife can claim arrears of maintenance for three years when the arrears are payable. However, as per Article 136 of the Limitation Act, it provides that when the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought takes place then application for enforcement of decree can be filed within 12 years from the date of the order or itself when the same is enforceable. In this type of situation as to whether Article 105 or Article 136 is to be applied, the learned advocate for the respondent has stated that in this situation the Court must apply Article 136 of the Limitation Act.

15. In support of the aforesaid contention, Ms.Megha Chitaliya, learned advocate has relied upon judgment of Orissa High Court in the case of **V.Krishnaveni Vs. V.Narasingha Rao and another reported in AIR 1985 NOC 131 (Orissa)** where the Orissa High Court has held that order for pendente lite maintenance and expenses of proceeding passed on

29.11.1972 and the execution application for enforcement of order filed on 25.1.1979, the Orissa High Court held that Article 136 of Limitation Act applies and application is filed within period of limitation. So I find great force in the contention of Ms.Chitaliya, learned advocate for the wife that Article 136 of the Limitation Act applies and I reject the contention of Mr.Kakkad, learned advocate for the husband that the application is barred by limitation. In view of the same, I hold that the application filed by the wife is within the period of limitation.

16. As regards maintenance, the order is passed on 22.2.1999 and the wife has claimed maintenance from 22.2.1999 to 19.7.2001. In this behalf the contention of the husband is that for some period both husband and wife have stayed together and for that period the maintenance cannot be granted. According to husband, both wife and husband stayed together from October 1999 to April 2006, whereas according to wife, both husband and wife have stayed together from October 2001 to April 2006.

17. Mr.Kakkad, learned advocate for the petitioner

has stated that power of Executing Court which provided under Order 21 Rules 97 to 103 of the CPC. For exercising power of Executing Court, he has relied upon judgment of this Court in the case of **Chandravati Co-op. Housing Society Ltd., Maninagar vs. Bhairavnath Education & Cultural Society Trust * Others reported in 1993(1) GLR 116 (Coram: S.D.Shah, J. (as he was then)).** The learned Judge has discussed the provision of Order 21 Rule 27 which provides resistance or obstruction to possession of immovable property. Rule 98 provides orders after adjudication. Rule 99 provides dispossession by decree-holder or purchaser. Rule 100 provides order to be passed upon application complaining of dispossession. Rule 101 provides question to be determined. Rule 102 provides rules not applicable to transferee pendente lite. Rule 103 provides orders to be treated as decrees and Rule 104 provides order under Rule 101 or 103 to be subject to the result of pending suit. The learned Judge has considered commentary of Mulla of CPC as well as AIR commentary of Sarkar on CPC. The learned Judge has also considered judgment of Calcutta High Court delivered by Justice G.N.Ray (as he was then) reported **in AIR**

1984 Cal.249 and determined the power of Executing Court. When the Executing Court decides the application of husband and wife, the Executing Court will consider this judgment and ratio laid down in this behalf. The learned Judge has also considered the judgment of this Court in **Pratapbhai V.Trivedi Vs. Priyavadu @ Ghanu Pratapbhai Trivedi (supra)** while considering the withdrawal application in this behalf. The learned advocate for the wife has disputed the said question, the learned Judge will also consider as to whether the said application is ultimately withdrawn or not and thereafter pass the final order in this behalf.

18. In view of this discussion, this Court is of the view that if following order is passed in light of the observations made therein, the same may be in the interest of justice.

18.1 The learned Judge is requested to allow both husband and wife to lead additional oral as well as documentary evidence if parties chooses for the same.

18.2 The learned Judge is also requested to

consider the averments made in the petition and the affidavit filed before this Court which is also record of the case.

18.3 After allowing to produce both oral and documentary evidence and after giving opportunity of hearing to both the parties, the learned Judge is requested to hear both the learned advocate for the petitioner-husband as well as respondent-wife and after hearing both of them, decide the same in accordance with law.

18.4 The learned Judge is requested to pass a speaking order in this behalf.

18.5 It may be noted that this Court has not decided anything on the merits of the matter except Mr.Kakkad contention on limitation. It will be open for the husband to raise other contentions before the trial court as the other issues have not been decided by this Court.

18.6 As regards amount of maintenance period and other reliefs, it will be open for the learned trial Judge to decide the same in accordance with law.

18.7 As regards arrears of maintenance, the husband is directed to pay arrears of maintenance for the period from 22nd February, 1999 to October 1999 at the rate of Rs.7,000/- per month by 28th February, 2007.

18.8 If the husband failed and neglected to make the payment of maintenance then it will be open for the learned trial Judge to impose the condition of interest on that amount.

18.9 If the arrears amount is not paid by 1st March, 2007, the husband will have to pay 9% interest on that amount.

18.10 The learned Judge is requested to decide the execution petition by 30th April, 2007, and both the parties have stated that they will cooperate with the hearing of the matter.

18.11 It will be open for the husband to withdraw the amount from Savings Account No.536902010000417, Union Bank of India, Rajkot Branch.

19. With the aforesaid observations and directions, the petition is disposed of. Rule is discharged with no order as to costs.

20. In view of the same, Civil Application No.1084 of 2007 is also disposed of with no order as to costs. Interim relief granted earlier shall stand vacated.

(K.M. Mehta, J.)

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